

*a***PUBLIC PROSECUTOR****v.****TIEW PENG LAM & ANOR.**

HIGH COURT MALAYA, SHAH ALAM

MAHADEV SHANKAR J

b

[CRIMINAL TRIAL NO. 4 OF 1987]

2 NOVEMBER 1989

CRIMINAL PROCEDURE: *Jury verdict - Trial Judge could not concur - Retrial - Whether automatic right to a new Judge - Discretion - No requirement - Criminal Procedure Code, ss. 204(2), 210(2), 231(b).*

c

In a previous trial the two accused were tried for murder and a verdict of majority of four to three was returned by the jury. As the trial Judge did not concur in the verdict, he, pursuant to s. 231(b) of the Criminal Procedure Code (CPC), ordered a retrial before another jury. At the hearing date, Counsel for the first accused formally applied for the case to be conducted by another Judge on the basis that the trial Judge had heard it before. Counsel for the second

*d***Held:**

Where a retrial has been ordered, there is no automatic right to a new Judge because the previous Judge has conducted the first trial. There is nothing in the CPC which requires the case to be tried before another Judge. It is a matter for the discretion of the Court and in the absence of good reasons, retrials in Malaysia would be held before the same Judge.

e

[Application refused.]

Cases referred to:

Reg. v. Bogle [1974] Cr LR 424

Reg. v. Quinn and Bloom [1961] 45 Cr App Rep 279; [1962] 2 QB 245

*f***Legislation referred to:**

Criminal Procedure Code, ss. 204(ii), 210(ii), 231(b), 235

For the public prosecutor - Siti Zainab Omar, DPP

For the 1st accused - Nadchatiram; M/s. J. Nadchatiram

For the 2nd accused - Gurbachan Singh (Kartar Singh with him); M/s. Bachan & Kartar

*g***JUDGMENT****Mahadev Shankar J:**

At a previous trial these two accused were tried for murder but the jury was unable to agree and returned a verdict by a majority of four to three.

h

As the Judge having the conduct of the case I could not concur in this verdict, and in accordance with s. 231(b) of the Criminal Procedure Code (the Code) I ordered the two accused to be tried again before another jury and to be remanded in custody the meanwhile.

It is to be noted that under s. 204(ii) of the Code the jury's verdict must be unanimous or by a majority of not less than five to two.

i

On 29 June 1989 all parties concerned were notified that the retrial was fixed to proceed from 15 to 29 August 1989. Mr. Nadchatiram who was defence Counsel for both accused in the earlier trial now acted for the first accused alone. Encik Gurbachan Singh was Counsel for the second accused.

a

On 15 August 1989 when the case came on for trial Mr. Gurbachan Singh was present. Mr. Nadchatiram was not. He sent a medical certificate to say he was suffering from conjunctivitis. The case was postponed to 21 August 1989. That day the case was further postponed because Mr. Nadchatiram was still indisposed.

b

After these two abortive starts with its consequent inconvenience and expense to all concerned when the case came on for hearing again on 2 October 1989, Counsel formally applied in open Court for the case to be conducted by another Judge. The only ground advanced by Mr. Nadchatiram was that I had heard the case before. Mr. Bachan Singh urged that it does not look right or proper for the same Judge to rehear the case, and submitted that where a retrial is ordered it is always before another Judge. Neither Counsel cited any authorities to support this application which I refused.

c

I said then that I would give my reasons in writing and I do so now.

Chapter XXII of the Code makes it patently clear that in jury trials in the High Court, it is the Judge sitting in open Court who has seisin of the case. After the jurors have been sworn it is the Court which gives the prisoner in charge to the jury (see s. 210(ii) of the Code). If the jury is unable to find a verdict it is the Judge who discharges the jury. The seisin of the case remains with the Court and the order made by the Judge under s. 235 of the Code is that the prisoners be tried in the same Court by another jury.

d

Consequently it is my view that there is nothing in the Code which required the case to be tried before another Judge.

e

Jury trials appear to have been abolished in India a long time ago. As for the English authorities I have looked at *Reg. v. Quinn and Bloom* [1961] 45 Cr App Rep 279 (also [1962] 2 QB 245 and *Reg. v. Bogle* [1974] Cr LR 424. I have not found these authorities persuasive since they give no reasons but I have noted that the full Court of Criminal Appeal has held that there is no rule that a retrial should take place before a different Judge. It is a matter of discretion.

f

Consequently I am reinforced in my view that where a retrial has been ordered there is no automatic right to a new Judge because he has conducted the first trial. Since any discretion must be judicially exercised, that is, for good reasons, the reverse is the case. In the absence of good reasons, retrials in Malaysia would be held before the same Judge.

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Also found at [1991] 2 CLJ 1197

h**i**